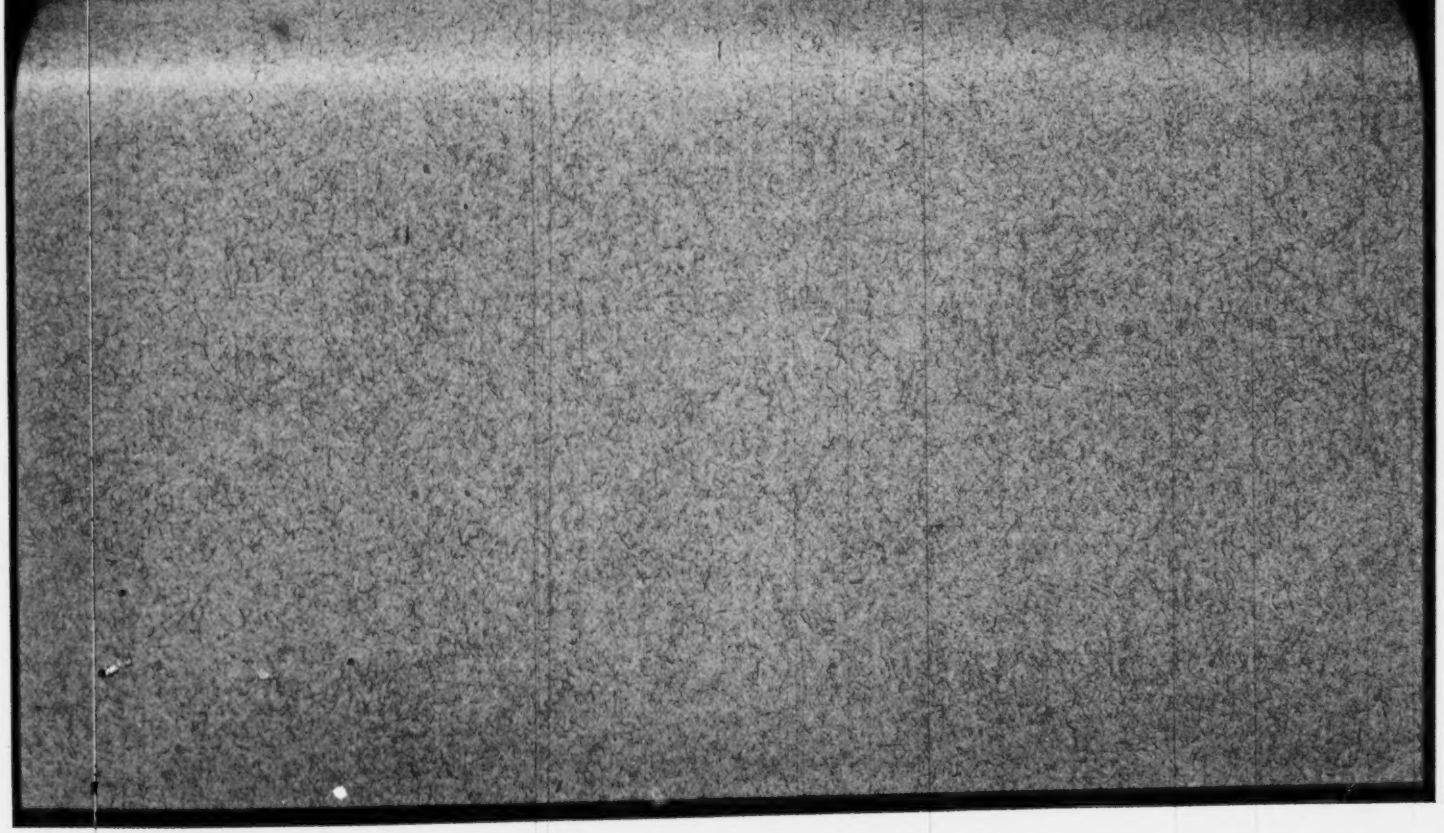

Supreme Court of the United States.

October Term, 1899.

No. .....

(ORIGINAL.)

Ex parte ORANGE FULLER, ASSIGNEE OF MANNY G. BUTLER AND ROBERT E. BUTLER, COMPOSING FIRM OF BUTLER BROTHERS, Petitioner.

Statement of Case and Brief of Argument for Petitioner.

STATEMENT.

This is an original action brought by petitioner as assignee of Butler Brothers, to procure the issuance of a writ for mandamus directed to the honorable W. H. H. Clayton, as judge of the United States Court in the Indian Territory and Central District thereof, commanding said judge to execute the mandate of this honorable court, and to set aside an order made on the fifteenth day of January, A. D. 1900, wherein a new trial was granted on behalf of the defendant, said cause being styled Orange Fuller, assignee, plaintiff below (defendant in error in this court) and The Missouri, Kansas and Texas Railway Company, defendant below (plaintiff in error in this court) said cause in this court bearing number 16,236.

The facts in the case are as follows:

On the twenty-third day of January, 1892, your petitioner herein as assignee of Butler Brothers, instituted an action in the United States Court in the Indian Territory, sitting at Muscogee, against The Missouri, Kansas and Texas Railway Company to recover damages alleged to have occurred by reason of a fire negligently set out by said company, which destroyed the property of Butler Brothers in Chouteau, Indian Territory.

Afterwards, and about the first day of May, 1894, the venue of said cause was properly changed to the second judicial division of the Indian Territory, now the Central District.

The cause was tried to a jury and on the second day of February, 1895, a judgment on the verdict of the jury was entered in favor of the petitioner and against The Missouri, Kansas and Texas Railway Company for eight thousand five hundred ($8,500.00) dollars.

Exceptions were taken, an assignment of errors filed, a supersedeas bond executed and approved, and the cause properly and regularly removed by writ of error into the United States Circuit Court of Appeals, eighth circuit, the record having been filed in that court on the third day of April, 1895.

On the thirtieth day of December, A. D. 1895, after said cause had been submitted on oral and printed arguments, an opinion of the United States Circuit Court of Appeals was filed affirming the judgment of the lower court, and judgment was in said United States Circuit Court of Appeals entered accordingly. (72 Fed. Rep., 467.)

Exceptions to said judgment were taken, and assignments of error filed, a supersedeas bond executed and approved, and the cause properly and regularly removed by writ of error into this court, the record being filed in this court on the twentieth day of March, A. D. 1896, which constituted case numbered 16,236.

Afterwards on the third day of January, A. D. 1898, the said judgment of the United States Court of Appeals, eighth circuit, and the United States Court in the Indian Territory, was affirmed by this honorable court. (168 U. S., 707.)

Afterwards about the third day of March, A. D. 1898, the mandate of this court was issued, and on the twenty-second day of July, 1898, was filed and entered of record in the United States Court in the Indian Territory, Central District.

After the removal of said cause to the United States Circuit Court of Appeals, eighth circuit, and to this Court by writs of error, and while the same was pending in this court, defendant below (plaintiff in error in this court) on the twentieth day of April, A. D. 1896, and without leave of this honorable court first had and obtained, filed in the United States Court in the Indian Territory, Central District, its petition for a rehearing upon newly discovered evidence, and subsequently filed amendments thereto as follows, to-wit:

May seventh, 1897, first amended petition for new trial.

August thirteenth, 1897, second amended petition for new trial.

September twenty-first, 1897, third amended petition for new trial.

May twentieth, 1898, fourth amended petition for new trial.

June twenty-seventh, 1898, amendment to fourth amended petition for new trial.

August thirtieth, 1898, second amendment to fourth amended petition for new trial.

To all of which petitioner filed answer and objected to the consideration of said petition and amendments thereto on the ground that said United States Court in the Indian Territory was without jurisdiction or authority in the premises, and that the issue sought to be made by the newly discovered evidence was not properly before said court, and that the proceedings were, and had been irregular, and not according to law.

On the fifteenth day of January, 1900, and after the mandate of this court had been filed and spread of record in lower court and without leave of this court, the said W. H. H. Clayton, as judge of said court, sustained said petition, and accordingly on that date entered an order upon the records of said United States Court in the Indian Territory granting a new trial in the said cause.

The petition for a new trial presented by The Missouri, Kansas and Texas Railway Company, was filed and granted under Sec. 5155. Mansfields Digests of the Statutes of Arkansas, adopted by Act of Congress, and in force as far as applicable in the Indian Territory, which is as follows:

> "Sec. 5155. Where grounds for new trial are discovered after the term at which the verdict or decision was rendered, the application may be made by petition filed with the clerk not later than the second term after the discovery, on which a summons shall issue, as on other complaints, requiring the adverse party to appear and answer it on or before the first day of the next term. The application shall stand for hearing at the term to which the summons is returned executed, and shall be summarily decided by the court. The evidence may either be by depositions or by witnesses examined in court. But no such application shall be made more than three years after the final judgment was rendered."

ARGUMENT.

The foregoing is a concise statement of the facts and presents, in our opinion, the one proposition of law, to-wit:

Had the United States Court in the Indian Territory jurisdiction to consider or determine the petition for new trial?

And we will now proceed to discuss this single proposition and the law applicable thereto.

Our contention plainly stated is, that after the appeal had on April 3, 1895, been perfected, including the filing and docketing of the record in the United States Circuit Court of Appeals, eighth circuit, and subsequently a removal from said Circuit Court of Appeals, and the filing and docketing of the record in the Supreme Court of the United States on December 30, 1895, the cause was wholly and absolutely removed from the trial court, and during the time said appeals were pending, and until the filing of the mandate in the lower court, the trial court had no authority to even consider, much less to determine, the question of a new trial. And subsequent to the filing of the mandate of the Supreme Court the consideration was still without authority and contrary to law because the time within which to file such a petition had expired; and further, application *must* be made to the Supreme Court for leave to file such a petition.

Mr. Elliott in his work on Appellate Procedure, Section 541, says:

> "The overwhelming weight of authority is that an appeal, properly perfected, removes a case wholly and absolutely from the trial court and places it in the higher tribunal. It is difficult to conceive how it could be otherwise, since it is not possible that two courts can have authority over a single case at the same time. The case must, of invincible necessity, be in the higher court or in the lower court, for it cannot be in both courts. As the authority of the inferior yields to the superior, the case is, for all purposes connected with the consideration and decision of the questions involved in it, completely within the jurisdiction of the appellate tribunal. * * * The loss of jurisdiction is so complete as to require a party who seeks relief from any error excepting an error in making the record or in omitting something from the record, to apply to the higher court. After the cause leaves the lower court it cannot act upon any question involved in the appeal. Where the appeal is made to oper-

ate as a supersedeas, as we have elsewhere shown, it operates not only to divest the jurisdiction of the trial court, but also to preclude the trial court or the parties, from taking steps to enforce the judgment."

See also cases cited in note 1.

In *Citizen's Bank of Wichita vs. Farwell*, 6 C. C. A., p. 30, Judge Caldwell says:

"The cause in which this writ of error was sued out was tried, and judgment rendered therein against the plaintiff in error, at the September term, 1892, of the United States Circuit Court for the district of Kansas, second division. Exceptions were taken, and an assignment of errors filed, and a supersedeas bond executed and approved, and the cause properly and regularly removed into this court by writ of error, the record being filed in this court on the 2d day of December, 1892, which constitutes case No. 213, the opinion in which is filed herewith. 56 Fed. Rep. 570. After the cause had been thus removed into this court, the plaintiff in error appeared at a subsequent term of the circuit court, and filed a motion in that court to vacate, set aside, and annul the said judgment, on various grounds. This motion the court overruled, and thereupon the plaintiff in error sued out this second writ of error in the same cause, and assigned for error the overruling of said motion. The removal of the case into this court under the first writ of error transferred the jurisdiction of the suit to this court, and the jurisdiction of the lower court was at an end. The writ of error is dismissed."

In support of the principle enunciated, Judge Caldwell cites the section quoted from Mr. Elliott's Appellate Procedure, and cites as authority, and follows, *Keyser vs. Farr*, 105, U. S. 265, and *Draper vs. Davis*, 102 U. S. 370.

Mr. Chief Justice Fuller delivering the opinion of the court in *Aspen Mining and Smelting Co. vs. Billings, et al.*, 150 U. S. 35, says:

"The general power of the Circuit Court over its own judgments, decrees and orders, during the existence of the term at which they are made, is undeniable, and an order allowing an appeal is subject to that power so long as the appeal remains unperfected, *and the cause has not passed into the jurisdiction of the appellate tribunal*, citing

Draper vs. Davis, Keyser vs. Farr, *supra.*

See also *Western Wheel Scraper Co. vs. Drinnan*, 79 Fed. 820."

The contrary rule would have applied had the appeal been perfected in all details, as in the case at bar.

In the case of *Kimberly vs. Arms et ux.*, reported in 40 Fed. Rep. 548, the facts present a case in point.

Under the mandate of the Supreme Court of the United States, a final decree was entered in favor of the complainant in May, 1889. The defendants applied for leave to file a bill of review for the purpose of vacating and setting aside the decree, setting up in said bill of review and relying as grounds for relief upon alleged errors of law apparent on the face of the record, *newly discovered evidence and fraud on the part of complainant* in procuring said decree.

But *before* making the application defendants, during the term of court at which said decree was rendered, prayed an appeal to the Supreme Court of the United States, appeal bond was duly executed and approved and the appeal perfected before defendants presented the application for leave to file their bill of review. In addition to the grounds contained in the bill of review as stated above, the defendants alleged that it was not their purpose to perfect their said appeal by filing the record and docketing the cause in the Supreme Court as required by the rules.

The learned judge held that while the appeal had no doubt been improvidently taken and allowed, "still it has the effect of transferring the cause, and the decree sought to be reviewed, into the Supreme Court, etc.," and continuing, said, "with said appeal pending the Supreme Court, whether there rightfully or improvidently, *this court clearly has no authority or jurisdiction to entertain a bill of review to impeach said decree*, over which it has, for the present at least." After stating the proposition that a party cannot concurrently pursue the two remedies of appeal and bill of review, continuing, says:

> "It is accordingly settled (*Ensminger vs. Powers*, 108 U. S. 302, 303,) that while an appeal is pending in the Supreme Court, although there is no *supersedeas*, the Circuit Court has no jurisdiction to vacate the decree in pursuance of the prayer of the bill of review, *because such relief is beyond its control.*"

The leave to file the bill of review having been refused by the Circuit Court, defendant appeals and the appeal was subsequently docketed and dismissed on motion of appellee.

Armes vs. Kimberly, 136 U. S. 629.

The Supreme Court of Arkansas in *Jacks vs. Adair*, 33 Ark. 166, construes section 5155, under which this petition for a new trial was filed.

Notwithstanding the petition was filed after the expiration of the three years allowed by the statutes, yet the court, speaking through Eaken, J., plainly shows the rule to be adopted when a point similar to the one in controversy is brought before it. It says:

> "The Circuit Court, then, did not err in sustaining the demurrer to the petition on the ground that it had not been filed within three years. The statutes make no exceptions, and it is not within any manifest equity of its provisions to make one in a case like this. The appellant had the option to dismiss the appeal, and rely upon his petition at any time within the three years, upon the discovery of new evidence, and there is no more reason for extending the statutory limit where an appeal has been taken, than exists where it has not. The appeal is his own and creates the obstacle against filing the petition below, if any exists, pending the appeal, and rely upon it, until its futility be shown by affirmance of the judgment; and then have a still further extension of three years to file a petition for a new trial. This would enable him, at least at his own option, if not of his wrong, to make an indefinite extension of the limitation dependent upon the delays incident to this court."

It has been truly said if a party can obtain a new trial while an appeal is pending the effect is to terminate the case in the higher court, since nothing is left for decision. There is no longer any controverted question. The effect of such a doctrine is to practically make the superior tribunal yield to the inferior.

The most recent opinion, and one that is directly in point, has been handed down by Mr. Justice Gray of this honorable court, decided March 15, 1897. *In re Patts Petitioner*, 166 U. S. 263, and it contains a clear exposition of the law of this case. The opinion and the authorities cited therein fully sustain our contention on every legal proposition in this application, and go to the extent that we deem it unnecessary to prolong our argument.

The authorities cited conclusively sustain our contentions, to-wit:

1st. That the removal of the cause into the United States Circuit Court of Appeals, and subsequently into the Supreme

Court of the United States, by writs of error transferred the jurisdiction of the suit to the appellate courts and the jurisdiction of the United States Court in the Indian Territory over the case was at an end.

2d. That the United States Court in the Indian Territory was without jurisdiction or authority to consider or determine the petition for new trial while said cause was pending in the appellate courts.

3d. That the United States Court in the Indian Territory was without authority to hear and determine said petition after mandate from the Supreme Court of the United States, for the reason the statutory time had expired.

4th. That no petition for new trial in any event could properly be filed without leave of the appellate court, which was never obtained, and then it must be within time allowed by the statute.

We respectfully submit the motion for leave to file the petition for mandamus should be allowed and an order issued to said judge to show cause why the writ of mandamus should not be issued as prayed.

Respectfully submitted,

RICHARD B. SHEPARD,

HARRISON O. SHEPARD,

Attorneys for Petitioner.

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Supreme Court of the United States.

No. 7.

Original O. T. 1900.

EX PARTE ORANGE FULLER, AS ASSIGNEE OF MANNY G. BUTLER AND ROBERT E. BUTLER, COMPOSING THE FIRM OF BUTLER BROTHERS, PETITIONER.

Demurrer of Petitioner to return of Hon. William M. M. Clayton, Judge, to rule to show cause why a Writ of Mandamus should not be issued.

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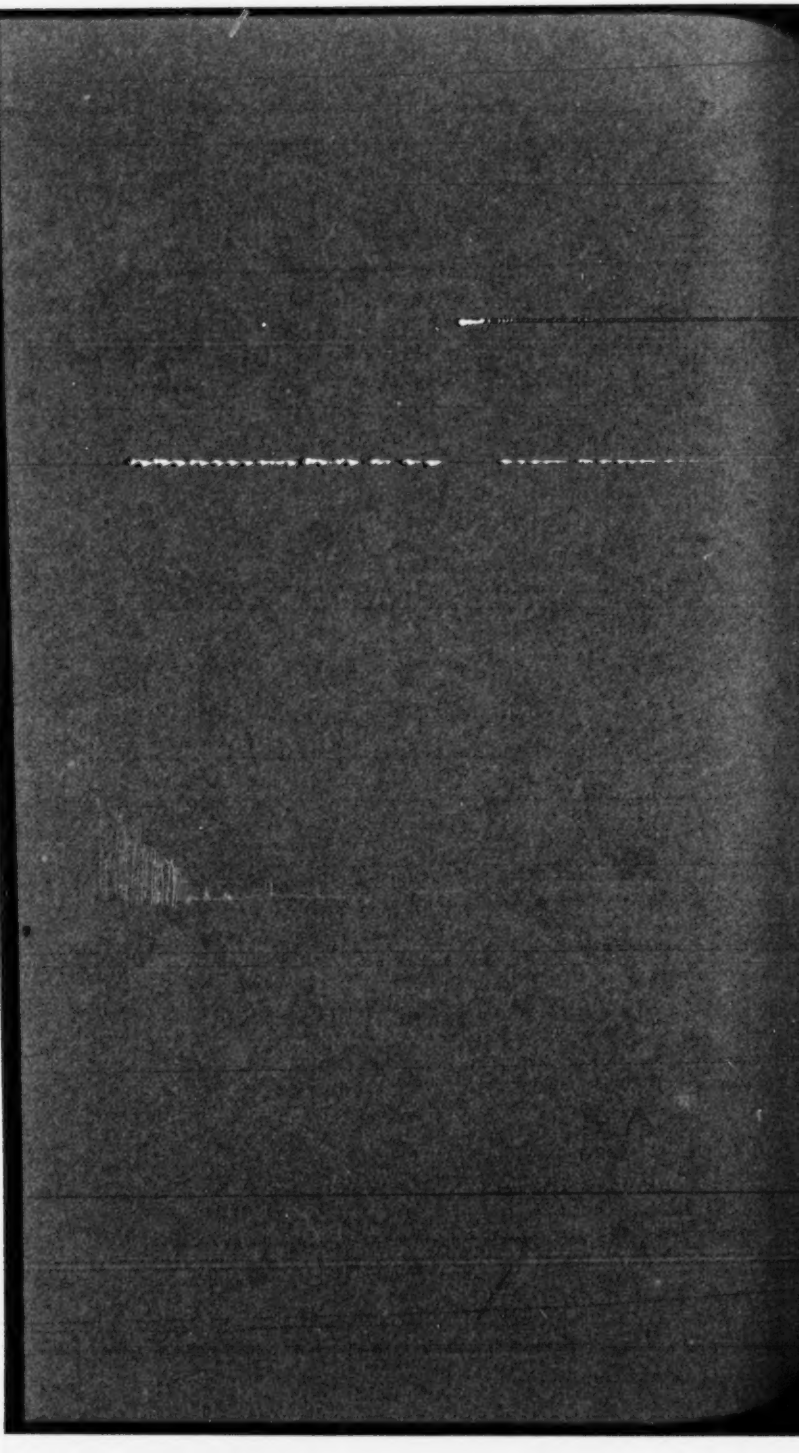

Supreme Court of the United States.

No. 7.

Original O. T. 1900.

EX PARTE ORANGE FULLER, AS ASSIGNEE OF MANNY G. BUTLER AND ROBERT E. BUTLER, COMPOSING THE FIRM OF BUTLER BROTHERS, PETITIONER.

DEMURRER.

Comes the petitioner herein and demurs to the return of Respondent, Judge Wm. H. H. Clayton, to the rule to show cause why a writ of mandamus should not be issued, because the same does not state facts which constitute in law any grounds to authorize the refusal of said writ, and does not state such facts as constitute in law a sufficient answer to the petition of petitioner herein.

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WM. T. HUTCHINGS,
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